

November 24, 2003

Mr. David Boback  
Investigator  
United States Department of Labor  
Employment Standards Administration  
Wage and Hour Division  
P.O. Box 50205  
Honolulu, Hawaii 96850

Dear Mr. Boback:

Re: Access to Maui County Personnel Records in Connection  
with a "Whistle Blower" Investigation

This is in reply to your letter to the Office of Information Practices ("OIP") requesting an advisory opinion concerning the U.S. Department of Labor's ("Department") right to inspect and copy personnel records maintained by the County of Maui in connection with an investigation under title 33, section 1367, United States Code, and title 29, subtitle A, part 24, Code of Federal Regulations.

**ISSUE PRESENTED**

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the County of Maui must disclose otherwise confidential personnel records of county employees to the Department in connection with a Department investigation under the whistle blower, or anti-discrimination provisions of title 33, section 1367, United States Code, and federal regulations adopted thereunder.

**BRIEF ANSWER**

The UIPA provides that notwithstanding any provision to the contrary each agency shall disclose "[g]overnment records which, pursuant to federal law or a statute of this State, are expressly authorized to be disclosed to the person requesting access."

OIP Op. Ltr. No. 94-13

Haw. Rev. Stat. § 92F-12(b)(2) (Supp. 1992) (emphasis added).

Title 29, subtitle A, section 24.4(b), Code of Federal Regulations, provides that the Department may, as part of an investigation under title 33, section 1367, United States Code, "enter and inspect such places and records (and make copies thereof), may question persons being proceeded against and other employees of the charged employer, and may require the production of any documentary or other evidence deemed necessary to determine whether a violation of the law involved has been committed."

The United States Supreme Court and Supreme Court of the State of Hawaii have noted that validly enacted federal administrative regulations have a preemptive effect on state law equal to that of federal statutes, and that federal regulations have the force of federal statutory law.

Accordingly, we conclude that a "federal law" that expressly authorizes the disclosure of government records to the person requesting access for purposes of section 92F-12(b)(2), Hawaii Revised Statutes, includes both federal statutes and regulations adopted by federal agencies when acting within the scope of their congressionally delegated authority.

Thus, we conclude that under section 92F-12(b)(2), Hawaii Revised Statutes, and title 29, subtitle A, section 24.4, Code of Federal Regulations, the County of Maui must permit the Department to inspect and copy the personnel records of county employees in connection with an investigation conducted by the Department under title 33, section 1367, United States Code, and regulations adopted thereunder.

#### **FACTS**

As we understand it, an individual employed by the County of Maui filed a complaint with the Department alleging that the County of Maui discriminated against the employee in violation of section 1367 of the Federal Water Pollution Control Act, also known as a "whistle blower" law. The individual who filed a complaint with your office ("Complainant") was apparently dismissed from employment with the County of Maui, and had provided testimony and other information to the U.S. Environmental Protection Agency concerning sewage and other discharges that occurred in the County of Maui.

Mr. David Boback  
November 24, 2003  
Page 3

Title 33, section 1367, United States Code, provides in pertinent part:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter . . . .

Any employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination. A copy of the application shall be sent to such person who shall be the respondent. Upon receipt of such application, the Secretary of Labor shall cause such investigation to be made as he deems appropriate . . . .

33 U.S.C. § 1367(a), (b) (1986).

Title 33, section 1362(5), United States Code, defines the term "person" to include "a State, municipality, commission, or political subdivision of a State." As such, State and local governments are subject to the anti-discrimination provisions of title 33, section 1367(a), United States Code.

The Secretary of Labor has adopted regulations which, in part, implement the employee protection provisions of the Federal Water Pollution Control Act, and set forth procedures "for the expeditious handling of complaints by employees, or persons acting on their behalf, of discriminatory action by employers." 29 C.F.R. § 24.1(b) (1993). Title 29, subtitle A, section 24.4,

Code of Federal Regulations, sets forth the following provisions relating to the investigation of complaints filed under title 33, section 1367(a), United States Code, and other federal statutes prohibiting discrimination against employees:

**§ 24.4 Investigations.**

(a) Upon receipt of a complaint under this part, the Administrator shall notify the person named in the complaint, and the appropriate office of the Federal agency charged with the administration of the affected program of its filing.

(b) The Administrator shall, on a priority basis, investigate and gather data concerning such case, and as part of the investigation may enter and inspect such places and records (and make copies thereof), may question persons being proceeded against and other employees of the charged employer, and may require the production of any documentary or other evidence deemed necessary to determine whether a violation of the law involved has been committed.

29 C.F.R. § 24.4 (1993) (emphasis added).

In order to conduct its investigation, the Department requested the County of Maui to provide copies of certain personnel records about the Complainant, and you contacted the OIP requesting an advisory opinion regarding whether the County of Maui was required, or otherwise permitted, to grant the Department access to these records.

In a letter to you dated November 9, 1992, a copy of which is attached as Exhibit "A," we advised you that under the UIPA the County of Maui was authorized to disclose to the Department for its investigation personnel information that is confidential under the UIPA, including evaluations, performance reviews, correspondence, and reports. Our conclusion was based upon the fact that section 92F-19(a)(5), Hawaii Revised Statutes, authorized, but did not require, the County of Maui to disclose government records that are otherwise confidential under part II of the UIPA to a federal agency for the purpose of a civil or

Mr. David Boback  
November 24, 2003  
Page 5

criminal law enforcement investigation.<sup>1</sup> In accordance with our letter, the County of Maui disclosed the requested records to your Department pending further guidance from the OIP on its obligation to do so.

We also informed you in our previous letter that in a separate advisory opinion, we would advise you regarding whether, under the UIPA, the County of Maui must disclose to the Department the personnel records it previously requested to inspect and copy for its investigation under the anti-discrimination provisions of the Federal Water Pollution Control Act. In this letter, we shall address this issue.

#### **DISCUSSION**

In order to determine whether, under the UIPA, the County of Maui is required to disclose the personnel records requested by the Department, it is necessary to examine the provisions of section 92F-12(b)(2), Hawaii Revised Statutes, which provides:

(b) Any provision to the contrary notwithstanding, each agency shall also disclose:

. . . .

(2) Government records which, pursuant to federal law or a statute of this State, are expressly authorized to be disclosed to the person requesting access;

. . . .

Haw. Rev. Stat. § 92F-12(b)(2) (Supp. 1992) (emphasis added).

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<sup>1</sup>Section 92F-19(a), Hawaii Revised Statutes, was amended by Act 250, Session Laws of Hawaii 1993, and clarified the extent to which otherwise confidential government records may be disclosed to federal, state, and foreign law enforcement authorities in connection with a civil or criminal law enforcement activity authorized by law.

The UIPA was modeled upon the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioners on Uniform State Laws. Section 92F-12, Hawaii Revised Statutes, is substantially similar to section 3-101 of the Model Code, which prohibits an agency's disclosure of personal records, unless the disclosure falls within one of the exceptions set forth in the section. Section 3-101 of the Model Code provides in pertinent part:

§3-101. [*Limitations on Disclosure to Public.*] An agency may not disclose or authorize disclosure of an individually identifiable record to any person other than the individual to whom the record pertains unless the disclosure is:

. . . .

(5) pursuant to federal law or a statute of this State that expressly authorizes disclosure; . . . .

The Model Code commentary<sup>2</sup> to this provision explains:

[S]ubsection (5) provides that information cannot be withheld if its disclosure is pursuant to a federal law or state statute. The general non-disclosure policy of Section 3-101 is not intended to supersede other express legal requirements.

Model Code § 3-101 Commentary at 21 (1980).

In previous OIP advisory opinions, we have observed that an administrative regulation adopted by a State or county agency pursuant to a general delegation of rulemaking power is not a state law that protects a government record from disclosure under the exception to required agency disclosure in section 92F-13(4),

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<sup>2</sup>The UIPA's legislative history suggests that the Model Code commentary be consulted for guidance in interpreting similar provisions of the UIPA. See H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H. J. 969, 972 (1988).

Mr. David Boback  
November 24, 2003  
Page 7

Hawaii Revised Statutes. See OIP Op. Ltr. No. 92-4 at 8-9 (June 10, 1992); OIP Op. Ltr. No. 92-3 at 12 n.12 (March 19, 1992) ("a contrary conclusion would permit agencies to readily defeat the comprehensive legislative scheme established by the UIPA").

However, in the facts before us, a federal regulation, not an administrative rule of a State or county agency, is applicable. Under title 29, subtitle A, section 24.4, of the Code of Federal Regulations, the Department is authorized to inspect and demand production of records and documentary evidence deemed necessary to determine whether a violation of title 33, section 1367, of the United State Code has occurred.

Our research discloses that the term "federal law" includes federal statutes, as well as regulations adopted by federal agencies. The U.S. Supreme Court has stated that "[t]he phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." City of New York v. Federal Communications Commission, 486 U.S. 57, 63-64 (1988). The Court found that under the Supremacy Clause, clause 2 of article VI of the United States Constitution, "'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law.'" Id., quoting Louisiana Public Service Comm. v. FCC, 476 U.S. 355, 369 (1986).

Likewise, the Supreme Court of the State of Hawaii has stated:

[Federal] administrative regulations may have a preemptive effect on state law equal to that of federal statutes, and unless the agency's position is inconsistent with clearly expressed congressional intent or subsequent developments reveal a change in Congress' position, the regulations of the federal agency charged with administering a federal act are dispositive on the question of preemption.

Larsen v. Pacesetter Systems, Inc., 74 Haw. 1, 13 (1992).

A court decision under the Michigan Freedom of Information Act also provides guidance in resolving the question whether title 29, subtitle A, section 24.4, Code of Federal Regulations is a "federal law" that expressly authorizes disclosure of a government record to the Department. In Soave v. Department of Education, 360 N.W.2d 194 (Mich. App. 1984), the court examined a federal regulation that restricted the disclosure of records of state agencies to participants in a federal-state program providing vocational rehabilitation services to handicapped individuals.

Specifically, the question before the court in Soave was whether agency records made confidential by title 45, section 1361.46, of the Code of Federal Regulations fell within the scope of the exemption to disclosure in the Michigan Freedom of Information Act applicable to information specifically described and exempted from disclosure by statute. The court in Soave found that the federal regulation had the force and effect of federal statutory law:

Since agency regulations promulgated by the federal government have the force of federal statutory law, Wyoming Hospital Ass'n v. Harris, 527 F. Supp. 551, 557 (D.Wy. 1981), reliance upon a federal regulation to exempt a document is proper.

Soave, 360 N.W.2d at 195-196.<sup>3</sup>

Based upon the above cited authorities, we believe that title 29, subtitle A, section 24.4, of the Code of Federal Regulations has the force and effect of federal statutory law. Because: (1) this federal regulation authorizes the Department to inspect and require the production of records and documentary

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<sup>3</sup>Compare Troutt Bros. v. Emison, 841 S.W.2d 604 (Ark. 1992) (federal law which does not prohibit the disclosure of records but only provides for loss of federal funds if information is disclosed does not supersede state freedom of information act). However, under section 92F-4, Hawaii Revised Statutes, an agency is not required to comply with any provision of the UIPA to the extent that compliance with that provision would cause an agency to lose or be denied funding, services, or other assistance from the federal government.



Mr. David Boback  
November 24, 2003  
Page 9

evidence necessary to determine whether a violation of the Federal Water Pollution Control Act, title 33, section 1367, United States Code, has occurred, and (2) the County of Maui is subject to the anti-discrimination provisions of this federal statute, it is our opinion that under section 92F-12(b)(2), Hawaii Revised Statutes, the County of Maui must permit the Department to inspect and copy personnel records of county employees that are otherwise confidential under part II of the UIPA.

Specifically, we conclude that title 29, subtitle A, section 24.4, Code of Federal Regulations, is a "federal law" that expressly authorizes the disclosure of government records to the person requesting access. Therefore, it is our opinion that the County of Maui must permit the Department to inspect and copy the personnel records the Department previously requested to be produced.

#### CONCLUSION

Based upon the legal authorities cited above, it is our opinion that under section 92F-12(b)(2), Hawaii Revised Statutes, title 29, subtitle A, section 24.4, Code of Federal Regulations, is a federal law that expressly authorizes the disclosure of government records to the Department. Accordingly, we conclude that, under the UIPA, the County of Maui must permit the Department to inspect and copy personnel records that are otherwise confidential under part II of the UIPA.

If you should have any questions regarding this opinion, please contact me at 586-1404.

Very truly yours,

Hugh R. Jones  
Staff Attorney

APPROVED:

Kathleen A. Callaghan  
Director

Mr. David Boback  
November 24, 2003  
Page 10

HRJ:sc\boback

c: Honorable Ray Kokubun  
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County of Maui

Honorable Guy Haywood  
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